HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

Chapter VIII, Rule 32(2) (b))

Description of the case

W.P. No. 5644 (M/S) of 2001
Smt. Rukhshana and another

Vs.

Sri R.K. Agarwal

Approved for reporting.√

Not approved for reporting

Date of decision- 2.11.2004.

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 5644 (MS) OF 2001

Smt. Rukhsana and another …….……Petitioners.

Versus

Sri R.K. Agarwal ……Respondent.

Mr. B.P. Nautiyal, counsel for the petitioner.

Mr. I.P. Kohli, counsel for the respondents. **Date- 2.11.2004**

HON'BLE RAJESH TANDON, J.

By the present Writ Petition, the petitioner has prayed for quashing of the order dated 30.09.2001, by which the appeal has been allowed and the Suit has been sent to the Court below for the payment of the Court fees and the application under Section 5 of the Limitation Act has already been allowed.

Briefly stated, the suit was filed by the plaintiff / respondent Sri. R.K. Agarwal being Suit No. 311 of 1995

By the present suit, the plaintiff / respondent has claimed relief for recovery of Rs. 55220/- along with interest @ 18% per annum.

Briefly stated the plaint case was that the plaintiff is doing the business of the property agent and the defendant no.2 has been doing the business of sale and purchase of the properties in the name of defendant no.1 namely Smt. Ruksana Umar and the defendant no. 2 Sri Mohd. Umar, is her husband. The plaintiff has paid a sum of Rs. 15,000/- on 11.10.1991 by cheque no. 645175 in the name of the District Cooperative Bank, Main Branch, Dehradun. For the repayment of the said amount, the defendant no. 2 Sri Moin Umar had given a post dated cheque bearing no. 000725 dated 10.1.1992 to the plaintiff for Rs. 55,000/- and thereafter, another cheque no. 063163 dated 25.11.1992 for Rs. 55,000/- drawn on Central Bank of India in lieu of the aforesaid cheque was given to the plaintiff.

Counsel for the respondent no. 2 has submitted that the aforesaid cheque could not be presented for encashment as the defendant has promised to pay the amount in cash. However, the said amount was not paid and ultimately in paragraph 7 of the plaint, it has been mentioned that notice, which was sent to the defendant by post, had been received back with the postal record unclaimed return to the sender. The plaint was presented on 24.11.1995, however, the same was dismissed for non-payment of the court fees. It was registered as Misc. Case No. 311 of 1995 without the payment of the court-fees and the same was dismissed on 3.12.1996 for non-payment of the court-fees.

An order was passed on 22.10.1999, by which the plaintiff was deprived of an opportunity to pay the court-fees on the plaint. The plaint was rejected on 3.12.1996 with the following order:-

"Prarthi Dwara Nyayashulk Dakhil Naheen Kiya Gaya Adesh Hua Ki

3-B is dismissed for want of prosecution."

The order dated 3.12.1996 was sought to be recalled by the plaintiff as the suit was dismissed for want of prosecution. The plaintiff has filed an application for setting aside the order dated 3.12.1996. The said application was rejected on 22.10.1999 only on the ground that since the court fees has not been paid for a long time, therefore, the plaint was rejected.

The operative portion of the order is quoted below:-

''निश्चय ही न्यायिक प्रक्रिया के अंतर्गत पैरवी करने वालों के प्रति सहानुभूति का रूख न्यायालय को होना चाहिये परन्तु जब कोई व्यक्ति जानबूझकर इसका दुयपयोग करे और विधिक प्रक्रिया अपनाने में असत्य आधारों का प्रयोग करे तो उसके पक्ष में सहानुभूति का प्रश्न नहीं है। ऐसी दशा में मैं इस निश्कर्श पर पहुंचा हूॅ कि प्रा0 पत्र 5 ग स्वीकार किये जाने का कोई औचित्य नहीं है। और यह विधिक वाद काल बाधित होने तथा उचित कारणों के आधार पर न होने के कारण खंडित होने योग्य है।''

The application was also accompanied with Section 5 of the Limitation Act. Plaintiff has also stated in his application following grounds:-

"2- *That the applicant throughout remained worried not only on account of financial problems but also on account of various other problems, as stated here under which was beyond his control.*

3- That Smt. Parul Agarwal, d/o applicant suffered from various diseases for a sufficiently long time, and now she has been suffering from Cancer.

4- That in addition the father of the applicant, who is about 85 years of age, and is at Chandigarh, has also been suffering from various diseases, and the applicant being his son has also been looking after him.

5- That the applicant in addition to incurring sufficient expenditure of the aforesaid reasons, has any how arranged the required court fees."

Aggrieved by the order dated 22.10.1999, the plaintiff went in appeal. The Appellate Court has allowed the appeal and has directed the parties to appear before the Civil Judge. The application under Section 5 of the Limitation Act was allowed. The Appellate Court has considered the cause for non-appearance and after considering the same, the Appellate Court has observed as under:

"पत्रावली के अवलोकन से यह तथ्य प्रकाश में आया है कि अपील में भी अपीलार्थी ने प्रा0 प्र, अ0 6 लिमि0 जो 7 ग था जिसका निस्तारण 29.05.2001 को किया गया था और उस प्रा0 पत्र में भी प्रार्थी ने अपनी पुत्री श्रीमती पारूल के कैंसर से पीड़ित होने तथा वृध्द पिता की बिमारी का आधार लिया था और उस आदेश में प्रार्थी की ओर से एक व्यवस्था ए.आई. आर. 1987 सुप्रीम कोर्ट पृश्ठ 1353 कलक्टर लैंड एक्यूजि ान अनन्त नाग व अन्य ब0 मुस्समात काटी जी एवं अन्य को प्रस्तुत किया जिसमें माननीय सर्वोच्च न्यायालय की धारा 5 लिमि0 ऐ0 के प्रा0 पत्र को स्वीकार करने के लिये सदैव उदार दृश्टिकोण अपनाना चाहिये और जो आधार अपीलार्थी ने अपनी पुत्री पारूलके कैंसर की बीमारी तथा अपने वृध्द पिता की बीमारी को प्रस्तुत किया है वह आधार पर्याप्त है। अन्ततोगत्वा अपीलार्थी की पुत्री पारूल का निधन भी हो गया ऐसी स्थिति में यह स्पष्ट होता है कि अपीलार्थी ने विलम्ब करने का आचरण कदापि दूषित नहीं था। असहायता के कारण अपीलार्थी मुल वाद में पैरवी नहीं कर सका और प्रकीर्ण वाद सं 171/98 भी विलम्ब से प्रस्तुत किया तथा इसी असहायता के कारण यह अपील भी विलम्ब से प्रस्तुत की है। इस प्रकार ऐसी असहायता को आचरण की रूप देना किसी भी प्रकार से उचित नहीं है औरजो व्यवस्थायें प्रत्यार्थी की ओर से प्रस्तुत की गयी हैं, प्रत्यार्थी को किसी प्रकार का लाभ नहीं पहुंचाती हैं और यह स्पष्ट हो जाता है कि अधीनस्थ न्यायालय ने अपने विवादित आदेश दि0 22. 10.99 में अपीलार्थी की इस असहायक परिस्थितियों की उपेक्षा है और न्याय का उद्देश्य सदैव दरवाजे खोलना है न कि दरवाजे बन्द करना इन परिस्थितियों मे अपील सबल प्रतीत होती है और स्वीकार किये जाने योग्य है।''

Counsel for the petitioner has submitted that it was a case, where the plaintiff has not paid the court fees and therefore, the trial court has rightly

passed the order dismissing the plaint for want of prosecution on account of non-payment of the court fees. Therefore, the Appellate Court has considered the grounds and has allowed the appeal.

Counsel for the petitioner has next submitted that once an order under Sub Clause (c) of Order 7 Rule 11 for non payment of the court fees was passed, there is no occasion to grant time for the payment court fees in as much as the Suit itself has become time barred after the expiry of the Limitation and secondly once the Suit has already been dismissed for want of prosecution on account of the non-payment of the Court Fees, there is no question of granting time and therefore, it becomes automatically barred by Limitation and there is no scope of entertaining any application under Section 5 of the Limitation Act.

Order 7 Rule 11 of the Code of Civil Procedure reads as under:-

" 11. Rejection of Plaint.—*The plaint shall be rejected in the following cases:-*

(a) where is does not disclose a cause of action;

(b) where the relief claimed is under valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint if written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) *where that the plaintiff fails to comply with the provisions of rule 9".*

(Provided, that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp

papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.)"

In the present case, Order 7 Rule 12 provides as under:-

"O.7.R. 12. Procedure of rejecting Plaint- *Where a plaint is rejected, the Judge shall record an order to that effect with the reasons for such order."*

A perusal of the order dated 3rd December, 1996 does not show any reason for rejecting the plaint except for want of prosecution on account of non payment of court fees and as such the order itself dated 3rd December, 1996 is violative of the provisions of order 7 rule 12 of the Code of Civil Procedure and it can not be allowed to stand.

Order 7 Rule 13 provides as under:-

"O. 7 R.13. ***Where the rejection of plaint does not preclude presentation of fresh plaint-*** *The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting the a fresh plaint in respect of the same cause of action.*

Order 7 Rule 13 as stated above does not preclude the plaintiff from filing the application under Section 5 of the Limitation Act or under Section 149 of the Code of Civil Procedure for payment of the Court Fees at a belated stage. Order 7 Rule 13 safeguards the interest of the plaintiff that another suit is not barred by virtue of the provisions of order 7 Rule 13 of the C.P.C.

Counsel for the petitioner has submitted 1997 Volume No. 1 SCC Page 502, where the dispute was that the appellant has sought permission to pay the court fees on the counter claim in appeal and therefore, the facts of the case are wholly distinguishable from the facts of the present case.

The counsel for the petitioner has also referred Section 148 and 149 of the Code of Civil Procedure, the same is quoted below:-

"148. *Enlargement of time.-* *Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, (not exceeding thirty days in total) even though the period originally fixed or granted may have expired."*

149. ***Power to make up deficiency of court-fees.-*** *Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fees is payable, to pay the whole or part, as the case may be, of such court-fee : and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as it such fee had been paid in the first instance."*

The apex court in AIR 1961 Supreme Court Page 882 has held that Section 148 and 149 and 151 clothed the High Court with ample power to do justice to the litigant if sufficient cause was made for extension.

Relevant paragraphs are quoted below:-

"But we are of opinion that in this case the court could have exercised its power first on July 13, 1954, when the petition filed within time was before it, and again under the exercise of its inherent powers, when the two petition under S. 151 of the Code of Civil Procedure were filed. If the High Court had felt disposed to take action on any of these occasions, Ss. 148 and 149 would have clothed them with ample power to do justice to a litigant for whom it entertained considerable sympathy, but to what aid it erroneously felt unable to come."

In the case of Ram Nath Sao @ Ram Nath Sahu and others Vs. Gobardhan Sao and others, reported in 2002 Supreme Court & Full Bench Rent Cases, Page 440, the Apex Court has held as under:-

"7.The expression 'sufficient cause' within the meaning of Section 5 of the Limitation Act, 1963 (hereinafter referred to as 'the Act'), Order XXII. Rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code') as well as similar other provisions and the

ambit of exercise of powers thereunder occasions. In the case of The State of West Bengal v. The Administrator, considering scope of the expression 'sufficient cause' within the meaning of Section 5 of the Act, this Court laid down that the said expression should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party.

8. *In the case of Sital Prasad Saxena (dead) by Lrs. V. Union of India and others AIR 1985 Supreme Court 1, the Court wa delaing with a case where in a second appeal, appellant died and application for substitution after condonation of delay and setting aside abatement filed after two years by the heirs and legal representatives was rejected on the ground that no sufficient cause was shown and the appeal was held to have abated. When the matter was brought to this Court, the appeal was allowed, delay in filing the petition for setting aside the abatement was condoned, abatement was set aside, prayer for substitution was granted and High Court was directed to dispose of the appeal on merits and while doing so, it was observed that once an appeal is pending in the High Court, the heirs are not expected to keep a consent watch on the continued existence of parties to the appeal before the High Court which has a seat for away from where parties sin rural areas may be residing inasmuch as in a traditional rural family the father may not have informed his son about the litigation in wcih he was involved and was a party. It was further observed that Courts should recall that "what has been said umpteen times that trules of procedure are designed to advance justice and should be so interpreted and not to make them penal status for punishing erring parties."*

9. *In the case of Rama Ravalu Gavade v. Sataba Gavadu Gavade (deed) through LRs. and another (1997) 1 Supreme Court Cases 261, during the pendency of the appeal, one of the parties died. In that case, the Hig Corut had refused to condone the delay in making an application for setting aside abatement and set aside abatement, but this Court condoned the delay, set aside abatement and directed*

the Appellate Court to dispose of appeal on merit observing that the High Court was not right in refusing to condone the delay as necessary steps could not be taken within the time prescribed on account of the fact that the appellant was an illiterate farmer.

10. *In the case of N. Balakrishnan Vs. . Krishnamurithy Supreme Court & Full bench Rent Cases, 1998, Page 427, there was a delay of 883 days in filing application for setting aside ex-parte decree for which application for condonation of delay was filed. The trial Court having found that sufficient cause was made out for condonation of delay, condoned the delay but when the matter was taken to the High Court of Judicature at Madras in a revision application under Section 115 of the Code, it was observed that the delay of 883 days in filing the application was not properly explained and it was held that the trial Court was not justified in condoning the delay resulting into reversal of its order whereupon this Court was successfully moved which was of the view that the High Ciourt was not justified in interfering with order passed by trial Court whereby delay in filing the application for setting aside ex parte decree was condoned and accordingly order of the High Court was set aside. K.T. Thomas, J., speaking for the Court succinctly laid down the law observing thus in Paras 8, 9 and 10.*

"8. The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

9. *It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such*

discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation of the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain othr cases, delay of a verylong range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the Superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different when the first Court refuses to condone the delay. In such cases; the Superior Court would be free to consider the cause shown for the delay afresh and it is open to such Superior Court to come to its own finding even untrammeled by the conclusion of the Fewer Court.

10. ……..The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."

The Court further observed in Paragraphs 11, 12 and 13 which run thus:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, never causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of

limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in forceclosing a suitor from putting forth his cause. There is no presumption that a delay in approaching the Court is always deliberate. This Court has held that the words "sufficient cause" under the Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari (1969) I SCR 1006 and State of W.B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366.

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forgot the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

11. Thus it become plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or XXII, Rule 9 of the Code or any other similar provision should receive a liberal

construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejection explanation furnished for the delay caused in taking steps. But one thing is clear that the Courts should not proceed with the tendency of finding faualt with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal and exception more so when no negligence or inaction or want bona fide can be imputed to the defaulting party."

The need of society is that there should be justice-oriented approach and the appeal should not be rejected only on the ground of technicalities. The Apex Court has held in (2001) 8 SCC 151, M.S. Grewal vs. Deep Chand Sood as under:

> *"Law Courts will lose their efficicacy if they cannot possibly respond to the need of the society- technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."*

In view of the aforesaid fact, I do not find any infirmity with the order passed by the Appellate Court while allowing the application under Section 5 of the Indian Limitation Act.

The writ petition has no force and is hereby dismissed.

Date- 2.11.2004 **(RAJESH TANDON J.)**

P.S. Rathour.